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In the Supreme Court of the United States

OCTOBER TERM, 1982

UNITED STATES OF AMERICA, PETITIONER

v.

STAUFFER CHEMICAL COMPANY

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES

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QUESTIONS PRESENTED

1. Whether the United States may be collaterally estopped from litigating a question of statutory interpretation of public importance governing the relationship between a federal agency and members of a large class of businesses subject to the agency's jurisdiction by the judgment of the court of appeals for a different circuit rendered in a different case involving the same private party but arising from a separate transaction at a different location.

2. Whether a contractor, retained by the Environmental Protection Agency specifically for the purpose, qualifies as an "authorized representative" of EPA's Administrator entitled to participate in agency inspections of stationary emission sources pursuant to Section 114(a)(2) of the Clean Air Act, 42 U.S.C. (Supp. V) 7414(a)(2).

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statute involved	1
Statement	2
Summary of argument	11
Argument:	
I. The United States may not be collaterally estopped from litigating a question of statutory interpretation by the adverse judgment of the court of appeals for a different circuit in an unrelated case	15
A. Collateral estoppel is inapplicable to an unmixed question of law arising in successive cases related only by the presence of that question and the presence, in each, of the party invoking the rule of preclusion	15
B. Collateral estoppel should not be applied against the government to preclude determination of recurring questions of public law	22
C. Identity of parties in successive cases does not justify application of collateral estoppel on recurring questions of public law	26
D. Other considerations weigh against application of collateral estoppel in the setting of this case	31
II. Under Section 114(a)(2) of the Clean Air Act, a contractor designated as an "authorized representative" by the EPA Administrator may participate in agency inspections of stationary air pollution sources	33

A. Statutory language and legislative history indicate that the Administrator is authorized to secure contractor assistance for stationary source inspections 33

B. Sufficient safeguards exist to protect against improper disclosure of trade secrets 46

Conclusion 47

Appendix 1a

TABLE OF AUTHORITIES

Cases:

Aluminum Co. of America v. *EPA*, No. M-30-13 (M.D.N.D. Aug. 5, 1980) 4

American Medical International, Inc. v. *Secretary of HEW*, 677 F.2d 118 .... 18, 23, 26, 27, 28

Bernhard v. *Bank of America Nat'l Trust & Savings Ass'n*, 19 Cal. 2d 807, 122 P.2d 892 17

Blonder-Tongue Laboratories, Inc. v. *University of Illinois Foundation*, 402 U.S. 313 ... 17

Bowen v. *United States*, 422 U.S. 916 30

Bunker Hill Co. v. *EPA*, Civ. No. 80-2087 (D. Idaho Oct. 15, 1980), aff'd, 658 F.2d 1280 .. 4, 8, 10, 11, 16, 34, 41

Califano v. *Yamasaki*, 442 U.S. 682 18

Caminetti v. *United States*, 242 U.S. 470 33

Consumer Product Safety Commission v. *GTE Sylvania, Inc.*, 447 U.S. 102 42

Divine v. *Commissioner*, 500 F.2d 1041 26

E.I. du Pont de Nemours & Co. v. *Train*, 430 U.S. 112 ..... 18, 31

EEOC v. *Wyoming*, No. 81-554 (Mar. 2, 1983) 40

EPA v. *National Crushed Stone Ass'n.*, 449 U.S. 64 44

Cases—Continued: Page

Frock v. *United States Railroad Retirement Board*, 685 F.2d 1041 18
Gulf Oil Corp. v. *Copp Paving Co.*, 419 U.S. 186 40
Harrison v. *PPG Industries, Inc.*, 446 U.S. 578 40
INS v. *Hibi*, 414 U.S. 5 23
Mohasco Corp. v. *Silver*, 447 U.S. 807 35
Montana v. *United States*, 440 U.S. 147 .... *passim*
NLRB v. *Amax Coal Co.*, 453 U.S. 322 34
New Jersey Department of Environmental Protection v. *EPA*, 626 F.2d 1038 32
Olegario v. *United States*, 629 F.2d 204, cert. denied, 450 U.S. 980 26
Parklane Hosiery Co. v. *Shore*, 439 U.S. 322 ..... 17, 21, 22, 31
Reiter v. *Sonotone Corp.*, 442 U.S. 330 35
Republic Steel Corp. v. *Costle*, 621 F.2d 797 . 32
Sharon Steel Corp. v. *EPA*, 597 F.2d 377 32
Standefer v. *United States*, 447 U.S. 10 23
Stauffer Chemical Co., In re, 14 Env't Rep. Cas. (BNA) 1737, aff'd, 647 F.2d 1075 .3, 4, 16, 38
Steele v. *United States No. 2*, 267 U.S. 505 .. 38
Train v. *NRDC*, 421 U.S. 60 ..... 31, 44
Triplett v. *Lowell*, 297 U.S. 638 17
Udall v. *Tallman*, 380 U.S. 1 44
Union Electric Co. v. *EPA*, 427 U.S. 246 .... 31, 44
United States v. *American Trucking Ass'ns*, 310 U.S. 534 35
United States v. *Gannon*, 201 F. Supp. 68 ... 38
United States v. *Moser*, 266 U.S. 236 .... 6, 11, 15, 16, 19
United States v. *Rutherford*, 442 U.S. 544 ... 37, 42

Cases—Continued: Page

United States Steel Corp. v. *EPA*, 595 F.2d 207, modified, 598 F.2d 915 32

United States Steel Corp. v. *EPA*, 605 F.2d 283, cert. denied, 444 U.S. 1035 32

United States Steel Corp. v. *EPA*, 649 F.2d 572 32

United States v. *Turkette*, 452 U.S. 576 33

Western Oil & Gas Ass'n v. *EPA*, 633 F.2d 803 ..... 7, 26, 31

Statutes, regulations and rules

Clean Air Act, 42 U.S.C. (Supp. V) 7401 *et seq.* 2

Section 101, 42 U.S.C. (Supp. V) 7401(b)(1) 33

Section 107, 42 U.S.C. (Supp. V) 7407 ... 2

Section 108(j), 42 U.S.C. (Supp. III 1964 ed.) 1857d(j) 39

Section 207(a), 42 U.S.C. (Supp. III 1964 ed.) 1857f-6(a) 39

Section 109, 42 U.S.C. (Supp. V) 7409 ... 2

Section 110, 42 U.S.C. (Supp. V) 7410 ... 2

Section 112, 42 U.S.C. (Supp. V) 7412 ... 2

Section 114, 42 U.S.C. (Supp. V) 7414 ... 1, 9, 14, 28, 33, 39, 41, 46, 1a

Section 114(a), 42 U.S.C. (Supp. V) 7414(a) 33

Section 114(a)(1), 42 U.S.C. (Supp. V) 7414(a)(1) 33

Section 114(a)(2), 42 U.S.C. (Supp. V) 7414(a)(2) ..... *passim*

Section 114(c), 42 U.S.C. (Supp. V) 7414(c) 9, 13, 14, 35, 36, 38, 44, 46

Section 114(d), 42 U.S.C. (Supp. V) 7414(d) 9, 13, 36, 37, 39

Section 206, 42 U.S.C. (Supp. V) 7525 ... 41

Section 206(c), 42 U.S.C. (Supp. V) 7525(c) 41

Statutes, regulations and rules—Continued: Page

Section 208, 42 U.S.C. (Supp. V) 7542(a) . 41
Section 301, 42 U.S.C. (Supp. V) 7601 ... 36
Section 307(b)(1), 42 U.S.C. (Supp. V) 7607(b)(1) 31, 32
Clean Air Act Amendments of 1977, Pub. L. No. 95-95, Section 113, 91 Stat. 709 36
Clean Water Act, 33 U.S.C. 1251 *et seq.*:
Section 308, 33 U.S.C. (& Supp. V) 1318 . 10
Section 308(a)(B), 33 U.S.C. (& Supp. V) 1318(a)(B) 42
Section 509(b), 33 U.S.C. 1369(b) 31
Comprehensive Environmental Response Compensation and Liability Act of 1980, Pub. L. No. 96-510, 94 Stat. 2767, 42 U.S.C. (Supp. V) 9601 *et seq.* 42
Economic Stabilization Act of 1970, Section 211(b)(1), 12 U.S. 1904 note 32
Solid Waste Disposal Act, 42 U.S.C. 6921 *et seq.*:
Section 3007, 42 U.S.C. (Supp. V) 6927 ... 10
Section 3007(a), 42 U.S.C. (Supp. V) 6927(a) 43
Surface Mining Control and Reclamation Act of 1977, Section 526(a)(1), 30 U.S.C. (Supp. V) 1276(a)(1) 32
84 Stat. 1687-1688 33
5 U.S.C. 553 32
18 U.S.C. 3105 38
28 C.F.R. 0.20 24
40 C.F.R.:
Section 2.211(d) 47
Section 2.301(h)(2)(ii)(C) 47
41 C.F.R.:
Section 15-7.305-1 46
Section 15-7.350-2 46

Statutes, regulations and rules—Continued: Page

Sup. Ct. R.:
Rule 17.1 19
Rule 17.1(a) 25

Miscellaneous:
Agriculture—Environmental and Consumer Protection Appropriations for 1973: Hearings Before a House Subcomm. on Appropriations of the Comm. on Appropriations, 92d Cong., 2d Sess., Pt. 5, (1972) 45
40 Fed. Reg. 21990 (1975) 45
43 Fed. Reg. 40007 (1978) 45
H.R. 172555, 91st Cong., 2d Sess. (1970) § 5(a) 39
H.R. Conf. Rep. No. 95-564, 95th Cong., 1st Sess. (1977) 37
Legislative History of the Clean Air Act Amendments of 1970, 93d Cong., 2d Sess. (Comm. Print 1974) 40
2 Moody's Industrial Manual (1982) 29
Restatement (Second) of Judgments (1982):
§ 28 15
§ 28, comment b 21
§ 28, comment c 17
§ 28(2) & comment c 26
§ 28, illustration 1 18
§ 28, illustration 2 18
§ 28(3) 19
§ 28, Reporter's Note 17, 21
§ 29, comment i 26
§ 29(7) 26
S. 1480, 96th Cong., 1st Sess. (1979) 42
S. 4358, 91st Cong., 2d Sess. (1970) 40
Second Supplemental Appropriations for Fiscal Year 1971: Hearings on H.R. 8191 Before the Senate Comm. on Appropriations, 91st Cong., 1st Sess. (1971) 45

Miscellaneous—Continued: Page

S. Rep. No. 92-414, 92d Cong., 2d Sess. (1971) 11
S. Rep. No. 96-176, 96th Cong., 2d Sess. (1979) 44
S. Rep. No. 96-848, 96th Cong., 2d Sess. (1980) 43
Vestal, *Relitigation by Federal Agencies: Conflict, Concurrence and Synthesis of Judicial Policies*, 55 N.C.L. Rev. 123 18
Webster's Third New International Dictionary (1976) 34

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-41a) is reported at 684 F.2d 1174. The court of appeals' order upon denial of a petition for rehearing (Pet. App. 42a-43a) is reported at 684 F.2d 1193. The opinion of the district court (Pet. App. 44a-56a) is reported at 511 F. Supp. 744.

JURISDICTION

The judgment of the court of appeals (Pet. App. 57a-58a) was entered on July 7, 1982, and a timely petition for rehearing was denied on October 15, 1982 (Pet. App. 42a-43a). On January 3, 1983, Justice O'Connor extended the time for filing a petition for a writ of certiorari to and including February 27, 1983, a Sunday. The petition was filed on February 28, 1983, and was granted on April 18, 1983. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTE INVOLVED

Pertinent portions of Section 114 of the Clean Air Act, 42 U.S.C. (Supp. V) 7414 are set out in an Appendix to this brief.

STATEMENT

This case arises from respondent's challenge to use of a contractor-representative designated by the United States Environmental Protection Agency ("EPA") to provide technical assistance to EPA employees in conducting an inspection of a stationary emission source under Section 114(a)(2) of the Clean Air Act, 42 U.S.C. (Supp. V) 7414(a)(2). The district court held that the Administrator's statutory authority to employ "authorized representative[s]" in such inspections was broad enough to permit use of such specially retained contractors. The court of appeals reversed. With each member of the panel writing separately, concurrent majorities held alternatively: (1) that the United States is collaterally estopped from advancing its interpretation of the statutory language, having lost the issue in litigation involving a different plant operated by respondent in the Tenth Circuit, and (2) that Section 114(a)(2) does not permit the agency's specially designated contractor-representatives to enter the premises of stationary emission sources for the purpose of measuring emissions from such sources.

1. In early 1980 EPA contracted with PEDCo Environmental, Inc. to assist with technical aspects of an overview inspection of an elemental phosphorus production plant operated by respondent located in Mt. Pleasant, Tennessee.[1]

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[1] The Clean Air Act, 42 U.S.C. (Supp. V) 7401 *et seq.*, establishes a dual state-federal system of air pollution enforcement. EPA establishes national ambient air quality standards, 42 U.S.C. (Supp. V) 7409, while the states are primarily responsible for enforcing these standards, subject to EPA's supervision and approval, 42 U.S.C. (Supp. V) 7407, 7410, 7412. In order to carry out its oversight role EPA employs its Section 114(a)(2) inspection authority to conduct an "overview inspection program" under which it inspects approximately 10% of the major stationary sources of air pollution within each state annually. These sources are also inspected by state authorities that submit reports to the EPA. The results of each overview inspection are compared with the results of the state inspection. A primary purpose of the overview inspection program is to facilitate evaluation of each state's performance in enforcing the Clean Air Act, thereby enabling EPA to determine whether additional federal enforcement effort may be warranted.

EPA officials attempted to inspect respondent's Mt. Pleasant plant on March 27, 1980. When EPA personnel, accompanied by representatives of the Tennessee Department of Public Health and PEDCo personnel retained by EPA, arrived at the plant, respondent denied entry to the two PEDCo employees. In ensuing negotiations, respondent attempted to condition admission of PEDCo personnel upon EPA and PEDCO's adherence to terms respondent had fixed. In addition to confidentiality requirements and provisions for damages in the event of any breach, the agreement proposed by respondent would have afforded it absolute authority to determine the areas of the plant to be inspected by EPA, and would have required two weeks' advance notice of any inspection (Pet. App. 6a, 45a). EPA deemed these provisions unacceptable.

Thereafter, on August 7, 1980, EPA secured a warrant from a United States magistrate authorizing inspection of respondent's Mt. Pleasant, Tennessee facility. The warrant covered inspections by EPA employees and "accompanying authorized representatives under contract to EPA." EPA and state officials, again accompanied by a PEDCo employee, again attempted to inspect respondent's Mt. Pleasant phosphorus plant pursuant to the warrant. Respondent again refused to permit a PEDCo employee to assist in the inspection of the plant unless its restrictive conditions were accepted by EPA and the contractor.

2. The following day, August 8, 1980, EPA moved to have respondent held in civil contempt by the United States District Court for the Middle District of Tennessee for its refusal to honor the warant. Respondent countered with a motion to quash the warrant. Respondent argued that Section 114(a)(2) of the Clean Air Act, which empowers the EPA Administrator "or his authorized representative" to enter upon the premises of stationary pollution sources to sample emissions, does not sanction entry by contractors retained by EPA to assist in such inspections.[2] The op-

[2] Although the statutory question had, by the date of the hearing on its motion to quash, been decided in its favor in separate litigation involving a different plant, see *In re Stauffer Chemical Co.* 14 Env't Rep. Cas. (BNA) 1737 (D. Wyo. 1980) (first alternative holding), re-

posed applications were consolidated for hearing. On April 17, 1981, the district court denied the motion to quash. Based upon consideration of the statutory language in issue, language of related provisions of the Clean Air Act, and pertinent legislative history, the court held that the inspection authority granted to "authorized representative[s]" of the EPA Administrator by Section 114(a)(2) includes properly retained contractors (Pet. App. 44a-55a).[3] Because respondent's noncompliance with the warrant was based upon its good faith "belie[f] that private contractors were not authorized representatives" under the Clean Air Act, however, EPA's contempt motion was denied, without prejudice to its renewal in the event respondent persisted in its refusal to honor the warrant (*id.* at 56a).

3. On appeal, in addition to the merits of the question of statutory interpretation presented, respondent argued, for the first time, that the decision in *In re Stauffer Chemical Co.*, 14 Env't Rep. Cas. (BNA) 1737 (D. Wyo. 1980), aff'd, 647 F.2d 1075 (10th Cir. 1981) (*"Stauffer I"*), collaterally estops the United States from contending that the term

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spondent did not argue in district court that the Wyoming district court's decision was to be given preclusive effect. A second decision, contrary to the Wyoming district court's, had, prior to submission of this case to the district court, been rendered in a case to which respondent was not a party. See *Aluminum Co. of America* v. *EPA*, No. M-30-13 (M.D.N.D. Aug. 5, 1980). After submission but prior to entry of the district court's decision in this case, a third district court decision, likewise supporting EPA's position, was rendered. *Bunker Hill Co.* v. *EPA*, Civ. No. 80-2087 (D. Idaho Oct. 15, 1980).

[3] The district court concluded that the confidentiality provisions of EPA's contract with PEDCo and PEDCo's agreement with its employees, together with the pertinent EPA regulations, were sufficient to dispel any concern about improper disclosure of proprietary business information by contractor personnel, in the absence of any evidence that PEDCo is in competition with respondent in any business (Pet. App. 53a-55a).

In the district court respondent also argued that EPA may not secure administrative warrants on an ex parte basis. The district court rejected this argument (Pet. App. 55a-56a), and although respondent preserved the argument on appeal (see *id.* at 3a), the court of appeals did not reach it. No issue respecting the procedure for issuance of a warrant is presented here.

"authorized representative" employed in Section 114(a)(2) includes a duly designated EPA contractor. Compare page 3 note 2, *supra*. *Stauffer I* addressed the legal question at issue in this case, but arose from respondent's motion to quash an administrative warrant, issued on May 8, 1980, authorizing EPA and two employees of a different contractor-representative to carry out an oversight inspection of respondent's phosphate ore processing plant in Sage County, Wyoming. The Wyoming district court had held in *Stauffer I* that Section 114(a)(2) does not authorize the EPA administrator to retain contractor personnel to assist in inspections of stationary sources of air pollutants and permanently enjoined EPA from using such contractor personnel in any inspection of any of respondent's plants located in Wyoming absent respondent's consent. Shortly after the entry of the district court's decision in the instant case, the United States Court of Appeals for the Tenth Circuit affirmed the district court's judgment in *Stauffer I*, albeit while cautioning that the issue was not "an open and shut matter" and acknowledging that under its decision the Clean Air Act is "not entirely internally consistent." 647 F.2d at 1079.

An unusually fragmented court of appeals reversed the decision of the district court in this case (Pet. App. 1a-41a). While each member of the panel concurred in the judgment, the reasoning of each judge was distinct, and each wrote separately. Judge Weick delivered what was characterized (*id.* at 1a) as the opinion of the court (*id.* at 1a-33a). But see page 6 note 4, *infra*. Although he "agree[d] with Stauffer that the action is governed by estoppel and res judicata" and that it was therefore "unnecessary to reach other issues," Judge Weick went on to reach the merits "because they were briefed by both parties," (*id.* at 4a), concluding that Section 114(a)(2) does not permit EPA contractors to participate in inspections of stationary pollution sources. Judge Jones joined only Judge Weick's discussion of collateral estoppel, stating that "the application of the doctrine precludes this Court from addressing the merits of the issue pressented" (*id.* at 34a). District Judge Siler (sitting by designation), on the other hand, joined only Judge

Weick's opinion on the merits of the statutory interpretation question, concluding that "the doctrines of collateral estoppel and res judicata should not be applied here" (*id.* at 39a). Thus both branches of Judge Weick's opinion spoke for a majority of the court, and the judgment of the court of appeals rests upon alternative holdings.[4]

a. *Collateral Estoppel*—Because "the parties as well as the issues of fact and law in the present case and *Stauffer I* were identical" (Pet. App. 11a), Judge Weick concluded that the doctrine of collateral estoppel described in *Montana* v. *United States*, 440 U.S. 147, 153-154 (1979), was controlling (Pet. App. 8a-13a). He concluded, moreover, that the "unmixed questions of law" exception to the rule of preclusion noted in *Montana* (440 U.S. at 162, quoting *United States* v. *Moser*, 266 U.S. 236, 242 (1924)) was inapposite, characterizing the case as one governed by a " 'fact, question or right distinctly adjudged' " in *Stauffer I*, rather than an application of " 'a rule of law [enunciated] * * * in a [previous] action upon a different demand' " (Pet. App. 12a-13a, quoting *United States* v. *Moser*, *supra*, 266 U.S. at 242). Finally, Judge Weick condemned the government's effort to "relitigate[ ]" (Pet. App. 12a) the issue decided in *Stauffer I* stating (*ibid;* emphasis added) that the government's persistence

> brings up the question, how many times does the government have to lose a case before either the doctrines of collateral estoppel or res judicata are applied? If we were dealing with private parties rather than the government, there would be no question about it. *If EPA really believed the decision of the Tenth Circuit in Stauffer I was wrong, it could have petitioned the Supreme Court for certiorari, but it did not avail itself of that remedy, and it is too late to do so now. EPA cannot collaterally attack the Tenth Circuit decision in the present case.*

On the other hand, Judge Siler concluded that collateral estoppel had no application in this case (Pet. App. 39a-41a). He stressed that the "federal appellate courts 'traditionally

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[4] Judge Weick's reasoning that, notwithstanding the application of collateral estoppel, the merits should be addressed was his alone.

have permitted federal agencies to relitigate substantially identical *legal* issues raised by different transactions or events, after adverse decision elsewhere' " (*id.* at 40a, quoting *Western Oil & Gas Ass'n* v. *EPA*, 633 F.2d 803, 808 (9th Cir. 1980); emphasis the Ninth Circuit's). Judge Siler also observed that the issue preclusion rule was not to be applied so as to create injustice. He explained that injustice would result from application of collateral estoppel "if EPA were precluded from entering with private contractors at Stauffer's plant in Tennessee, but were using private contractors in entering competitor's plants in the same area." (Pet. App. 40a-41a). Judge Siler concluded, moreover, that *(ibid.)*:

> where several different cases involving the same issues are being litigated simultaneously in separate circuits, collateral estoppel should not be invoked.

Judge Jones wrote separately on the collateral estoppel issue, explaining his concurrence in that branch of the court's opinion (Pet. App. 34a-38a). Judge Jones recognized (*id.* at 35a) that under *Montana* v. *United States*, *supra*, collateral estoppel is not to be applied where "controlling facts or legal principles have changed significantly" since the judgment in a prior case, or where "other special circumstances warrant an exception to the normal rules of preclusion" (440 U.S. at 155). In Judge Jones' view, however, neither of these exceptions was applicable here (Pet. App. 35a-35a). He discounted Judge Siler's concern that application of collateral estoppel would foster uneven application of the law to parties similarly situated, suggesting that application of different rules of law to respondent's facilities in different locations would create a more substantial inequity. And even though he had concluded that, given the applicability of collateral estoppel, it was improper for the court of appeals to reach the merits (*id.* at 34a), Judge Jones observed that because the other two members of the panel *had* reached the merits, the inequity that troubled Judge Siler was "illusory." He explained: "[T]he *stare decisis* impact of the Court's holding today, if it becomes final, may be expected to eliminate the practice [of contractor-assisted inspections] in this jurisdiction" (*id.* at 37a; ci-

tation omitted). Finally, while Judge Jones agreed with Judge Siler that federal agencies ordinarily should be able to litigate controlling legal issues in more than a single circuit, he thought that rule inapplicable where the non-government parties in two cases are identical, at least where "the same defendant is sued *in seriatim* without the agency attempting to exhaust its appeals on the previous judgment" (*id.* at 37a, 38a).

b. Interpretation of Section 114(a)(2)—Writing for himself and Judge Siler, Judge Weick turned to the underlying question of statutory interpretation (Pet. App. 13a-33a). At the outset, Judge Weick acknowledged that the proper interpretation of the statute was not free from doubt, and that under his interpretation internal inconsistencies in the Clean Air Act remained (*id.* at 16a-7a).[5] He also recognized (*id.* at 15a-16a) that the decision of the Tenth Circuit in *Stauffer I* that he followed was directly contrary to the decision of the Ninth Circuit in *Bunker Hill Co.* v. *EPA*, 658 F.2d 1280 (9th Cir. 1981). Nevertheless, Judge Weick concluded that Section 114(a)(2) of the Clean Air Act does not permit contractors designated as EPA representatives to assist agency employees in carrying out the inspections of stationary pollution sources authorized by the statute.

The court of appeals initially rejected EPA's contention that the plain meaning of the term authorized "representative" extended to contractor-representatives designated by EPA (Pet. App. 17a). The court also declined to assign any weight to Congress' adoption, in 1970, of the broad language "authorized representative" from the Senate version of the Clean Air Act Amendments bill in preference to the narrower term "officers or employees" contained in the analogous provision of the House Bill because the respective legislative reports do not address the present question. The court of appeals observed, as well, that the Conference Report made no mention of any difference between the two formulations and actually summarized the provisions of the alternative bills in nearly identical terms (*i.e.*, authorizing

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[5] Judge Siler similarly acknowledged the district court's decision on the Section 114(a)(2) issue was not clearly incorrect (Pet. App. 41a).

entry and inspection by "DHEW investigative personnel" as opposed to "DHEW personnel").[6] The court therefore concluded that Congress intended the term "authorized representative" to serve as a synonym for the terms "officers or employees" (Pet. App. 17a-20a).

In addition, the court of appeals reasoned that Section 114(d) of the Act, 42 U.S.C. (Supp. V) 7414(d), added by *1977* amendments, which requires "the Administrator (or his representatives)" to give notice to the state air pollution control agency before making an inspection under Section 114(a)(2), supports respondent's restrictive reading of the term representative as employed in the latter section. The court suggested that Congress could not have entrusted "this kind of sensitive intergovernmental communication to employees of private contractors," and concluded that the term "authorized representatives" used in Section 114(a)(2) should be given a similarly narrow reading (Pet. App. 20a-21a). The court of appeals rejected the district court's contrary observation (see Pet. App. 47a-48a) that Section 114(a)(2) should be read in conformity with Section 114(c). The court of appeals did not dispute that Section 114(c) authorizes the Administrator to disclose confidential business information learned during Section 114(a)(2) inspections to EPA contractor-representatives engaged in carrying out provisions of the Act. (Pet. App. 21a). But the court thought to harmonize all three provisions of Section 114 as follows (*id.* at 22a):

> [T]he word "representative" as used in Section 114 of the Clean Air Act means EPA officers or employees, unless the latter are already enumerated, as they are in Section 114(c). In that event, the plain meaning of "representative," i.e., one standing or acting for another through delegated authority, controls.

The court recognized that, under its interpretation, the term representatives is used in Section 114 in two different senses, but it thought this result unavoidable (Pet. App.

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[6] At the time in question, EPA had yet to be created, and the Secretary of Health, Education, and Welfare was charged with administration of the Clean Air Act.

22a). The court also believed that if the term "representative" employed in Section 114(a)(2) denoted persons other than EPA employees, the Administrator could make inspections of stationary pollution sources *only* in person or through persons other than agency employees *(ibid.)*.

Unlike the district court (see Pet. App. 48a-50a) and the Ninth Circuit (see *Bunker Hill Co.* v. *EPA*, *supra*, 658 F.2d at 1284), the court of appeals attached substantial weight to post-enactment legislative history respecting the 1972 Amendments to the Clean *Water* Act (Pet. App. 26a-29a).[7] The court reasoned that the timing and authorship of the Senate report on Section 308 of the Water Act lent substantial authority to the views expressed respecting previously enacted provisions of the Clean *Air* Act (*id.* at 28a). In any event, the court thought it "anomalous" (*id.* at 29a) that contractor assisted inspections be permitted under the Clean Air Act, but not under analogous provisions of the Clean Water Act *(ibid.)*.

Finally, the court of appeals relied (Pet. 29a-30a) upon a 1980 amendment to inspection provisions of the Solid Waste Disposal Act, 42 U.S.C. (Supp. V) 6927(a), that added "representative[s]" duly designated by the EPA Administrator to a list of persons—including agency employees and officers—previously authorized to make such inspections. The legislative history of that amendment makes explicit Congress' intention to allow EPA contractor-representatives to take part in inspections under the Solid Waste Disposal Act. The court reasoned that the absence of comparable language in the legislative history of Section 114(a)(2) of the Clean Air Act indicates that Congress did not intend to

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[7] The pertinent portion of the Senate Report on the 1972 Amendments to the Clean Water Act, S. Rep. No. 92-414, 92d Cong., 2d Sess. 63 (1971), states:

> It should * * * be noted that the authority to enter, as under the Clean Air Act, is reserved to the Administrator and his authorized representatives which such representatives must be full time employees of [EPA]. The authority to enter is not extended to contractors with the EPA in pursuit of research and development

permit comparable assistance in stationary source inspections under the Clean Air Act.[8]

SUMMARY OF ARGUEMNT

I

A. It has been settled, at least since *United States* v. *Moser*, 266 U.S. 236, 242 (1924), that collateral estoppel does not apply to questions of law arising between two parties in successive, but unrelated actions. It is undisputed that the underlying issue in this case is purely legal. Yet, the court of appeals declined to apply the unmixed question of law doctrine, invoking an exception to that rule applicable to cases that are said to present the same "demand."

This court has acknowledged (*Montana* v. *United States*, 440 U.S. 147, 163 (1979)) that the scope of the *Moser* doctrine is "difficult to delineate." But this much is clear: the unmixed question of law rule, rather than the exception thereto, must apply whenever successive cases are not significantly related except for identity of parties and commonality of legal issues. Otherwise, the unmixed question of law rule would itself be swallowed by its own exception.

This case and *Stauffer I* have no significant identity beyond the common issue and parties. The two cases arise from unrelated inspections of different facilities. Moreover, the two cases arise in separate circuits, which traditionally have been permitted to develop their own views as to the law based upon the cases before them, subject only to the authority of this Court's decisions. In any event, collateral estoppel does not serve its usual purposes in a setting such as this. The more flexible doctrine of stare decisis is sufficient to assure that no improper advantages attach to redetermination of legal issues in unrelated cases, and that

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[8] The court of appeals also found inconclusive the evidence supporting EPA's contention (previously accepted by the Ninth Circuit, *Bunker Hill Co.* v. *EPA*, *supra*, 658 F.2d at 1284 n.2) that Congress had ratified the agency's interpretation of Section 114(a)(2), by its failure to disturb it in amending the Act in 1977 (Pet. App. 31a). The court also found "doubtful" indications cited by EPA that Congress had ratified the agency's position by approving appropriations for contractor assistance (*id.* at 32a-33a).

unwarranted burdens are not placed upon litigants and the courts. And there is little advantage to invocation of collateral estoppel in terms of judicial economy, where, as here, the issues are purely legal and have been addressed with differing results by other courts of coordinate authority.

B. There are especially compelling reasons to eschew application of collateral estoppel with respect to recurring questions of law in government litigation. Reliance upon collateral estoppel in such cases fails to respect the unique public interest in rigorous enforcement of acts of Congress. Because of the government's presence in all such litigation, it would also undermine the existing process of development of the public law through selective appeals and resolution of conflicts, where necessary, by certiorari, freezing the development of the law and transferring a substantial caseload from the courts of appeals to this Court. The broad rule of estoppel applied by the court of appeals also would jeopardize the government's traditional self-restraint in seeking appellate review, a practice that benefits all who vie for a place upon the necessarily limited docket of this Court.

C. The court of appeals did not quarrel directly with the foregoing principles. Rather, it seems to have assumed that they have no application when the parties to successive cases are the same. But that approach would afford a party that happened to be involved in a prior case presenting the same legal question a favored position in the administration of the law as compared with all others similarly situated. As Judge Siler recognized (Pet. App. 40a-41a), if this case were decided for respondent on the basis of collateral estoppel, respondent would have the benefit of a special rule of law inapplicable to its competitors' plants.

To be sure, refusal to apply collateral estoppel means tolerating ad interim the existence of different rules of law in different jurisdictions. But this possibility is a necessary, and fundamentally desirable, concomitant of the structure of the federal judicial system. The incidence of conflicts resulting from the operation of that system should be relatively low, moreover, for the courts of appeals remain free to give the decisions of coordinate courts such weight as

their persuasive force warrants, and this Court remains available to resolve conflicts among the circuits where necessary. And where, as here, the decisions of the courts of appeals were already in conflict before the court below rendered its decision, uniformity of decision cannot be achieved by recourse to issue preclusion.

The possible application of collateral estoppel to recurring questions of law could confound the Solicitor General's process of screening adverse decisions to determine whether further review will be sought. Particularly when the issue is whether certiorari should be sought, that decision must continue to turn upon the existence of a conflict, and the other criteria traditionally applied by this Court.

II

A. The court of appeals' interpretation of Section 114(a)(2) of the Clean Air Act is contrary to all of the pertinent indications of legislative intent. The language of the statute itself plainly extends the authority to participate in inspections to all "authorized representatives" of the Administrator; there is no hint that this authority is limited to agency employees. Moreover, this reading is strongly supported by Section 114(c) of the Act, which authorizes disclosure of information gathered in stationary source inspections to nongovernment personnel engaged in enforcement of the Act.

The court of appeals, however, read Section 114(a)(2) in conformity with what it took to be the meaning of Section 114(d) of the Act, which provides for certain intergovernmental notices. Reliance on Section 114(d) was unwarranted. Unlike Sections 114(a)(2) and 114(c), which were enacted together in 1970, subsection (d) was added in 1977. Moreover, nothing in the legislative history or language of Section 114(d) supports the restrictive reading given that section by the court below. A fortiori, the court erred in forcing Section 114(a)(2) into the mold created by its own ipse dixit respecting subsection (d). The court of appeals acknowledged (Pet. App. 22a) that it had assigned

disparate meanings to a single term—"authorized representative"—that occurs twice in Section 114. That undesirable result is entirely unnecessary.

Nor is the decision below supported by the legislative history. To the contrary, Congress adopted the broad language of Section 114(a)(2) that extends authority to all of the Administrator's authorized representatives, choosing this language, found in the Senate version of the bill, in preference to language in the House Bill that limited inspection authority to agency employees. The decision of the court of appeals thus undoes this congressional choice. That Congress' choice was deliberate is also evidenced by the retention of the narrower formulation—"officers or employees" for the motor vehicle manufacturer inspection provisions of the Act. And contrary to the view of the court below, there is nothing irrational about the distinction thus created.

The least that can be said in favor of the Administrator's interpretation is that it is wholly reasonable and is not contrary to any evidence of legislative intent. In the circumstances, the court of appeals should have deferred to the agency's interpretation of the statute. The decision below, by contrast, will handicap the agency's enforcement of the Clean Air Act, by precluding EPA from acquiring technical assistance needed to carry out inspections of the wide variety of pollution sources in the most efficient manner possible.

B. The court of appeals seems to have assumed that EPA's use of contractor-representatives entails undue risk of general disclosure of trade secrets belonging to sources subject to inspection. But Congress plainly did not share this concern; Section 114(c) authorizes disclosure of such proprietary information to agency contractors engaged in tasks requiring such access. In any event, EPA's regulations, its contract with PEDCo, and PEDCo's contract with its employees, provide confidentiality safeguards and sanctions for any improper disclosure that fully protect the interest of respondent and others similarly situated.

ARGUMENT

I. THE UNITED STATES MAY NOT BE COLLATERALLY ESTOPPED FROM LITIGATING A QUESTION OF STATUTORY INTERPRETATION BY THE ADVERSE JUDGMENT OF THE COURT OF APPEALS FOR A DIFFERENT CIRCUIT IN AN UNRELATED CASE

A. Collateral Estoppel is Inapplicable to an Unmixed Question of Law Arising in Successive Cases Related Only by the Presence of that Question and the Presence, in Each, of the Party Invoking the Rule of Preclusion

The court of appeals held that "[s]ince the parties as well as the issues of fact and law in the present case and *Stauffer I* [are] identical" (Pet. App. 11a), the doctrine of collateral estoppel described in *Montana* v. *United States*, *supra*, 440 U.S. at 153-154, controls the result here (Pet. App. 8a-12a). In the court of appeals' view, "there [wa]s no valid reason" (*id.* at 12a) why it should be required to address the merits of the parties' dispute in the case. In our view, however, this case is governed by the exception to the rule of collateral estoppel applicable to pure questions of law arising in successive actions on substantially unrelated claims.

1. The Court defined the "unmixed question of law" exception to the rule of collateral estoppel in *Montana* v. *United States*, *supra*, 440 U.S. at 162, quoting *United States* v. *Moser*, *supra*, 266 U.S. at 242 (emphasis added by the *Montana* Court):

> Where * * * a court in deciding a case has enunciated a rule of law, the parties in a subsequent action *upon a different demand* are not estopped from insisting that the law is otherwise, merely because the parties are the same in both cases.

So, also, the *Restatement (Second) of Judgments* § 28, at 273-274(1982), provides in pertinent part:

> Although an issue is actually litigated and determined by a valid and final judgment * * * relitigation of the issue in a subsequent action between the parties is not precluded in the following circumstances:

* * * * *

(2) The issue is one of law and (a) the two actions involve claims that are substantially unrelated * * *.

The underlying question presented in this case is a pure question of law entailing only an interpretation of Section 114(a)(2) of the Clean Air Act. The district court and the court of appeals below agreed that the ultimate inquiry was one of congressional intent. See Pet. App. 13a, 46a. And both courts undertook to resolve that question by recourse to the conventional tools of statutory interpretation: statutory language, legislative history, examination of related or analogous language, and canons of construction. Similarly, both the Ninth Circuit and the Tenth Circuit have uniformly treated the question as one of purely legal dimensions. See *Bunker Hill Co.* v. *EPA*, *supra*, 658 F.2d at 1282-1284; *Stauffer I*, *supra*, 647 F.2d at 1077-1079. And we must suppose that the court below shared that view since it suggested (Pet. App. 12a) that the government, if dissatisfied with the Tenth Circuit's decision in *Stauffer I*, should have sought this Court's review of the Tenth Circuit's judgment.

2. The court of appeals noted (Pet. App. 12a) this Court's caution that the "unmixed question of law" doctrine does not apply in successive actions "*upon * * * different demand[s]*" and does not permit

> *a fact, question* or *right* distinctly adjudged in the original action [to] be disputed in a subsequent action, even though the determination was reached upon an erroneous view or by an erroneous application of law.

Montana v. *United States*, *supra*, 440 U.S. at 162, quoting *United States* v. *Moser*, *supra*, 266 U.S. at 242 (emphasis the *Montana* Court's). But the court below did not explain *why* this case fell outside the unmixed question of law doctrine as thus limited. Rather, the court stated summarily (Pet. App. 12a-13a):

> Since the fact, question or right in the present case was distinctly adjudged in *Stauffer I* the exception in *Moser* is inapplicable here.

As this Court recognized in *Montana* (440 U.S. at 163), "the scope of the *Moser* exception may be difficult to delin-

eate * * *." And commentators have agreed that the line between (permissible) relitigation of a common question of law arising in successive actions and impermissible relitigation of "a fact, question or right" previously adjudged is not a clear one. See *Restatement (Second) of Judgments* § 28, comment c, at page 277; *id.* at 286 (Reporter's Note). But unless the unmixed question of law rule is entirely to be abolished, a determination that successive actions present the same "demand," turn upon the same "fact, question or right," or are not "substantially unrelated," must rest upon something more than an identity of parties and of legal issues—for those factors are necessarily present whenever the predicate for application of the *Moser* doctrine exists in a case litigated between parties that have previously litigated a legal question. See *Restatement (Second) Judgments* § 28, Reporter's Note at 286 (collateral estoppel disfavored when two claims arise from "unrelated event[s] or subject matter").[9]

Yet the court of appeals identified no other respect in which this case is related to *Stauffer I*, and appears to have relied entirely upon the identity of parties and the common legal question. See Pet. App. 11a-12a. In fact, *Stauffer I* and the present suit are related in no other way. The two cases arise out of different transactions—entirely unrelated inspections of different industrial facilities that were to be conducted with the assistance of different contractor-representatives. The two facilities are located in different states, and different EPA administrative regions. Each inspection

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[9] *Moser* was decided long before the strict rule of mutuality of estoppel began to be eroded. See *Parklane Hosiery Co.* v. *Shore*, 439 U.S. 322 (1979); *Bernhard* v. *Bank of America Nat'l Trust & Savings Ass'n*, 19 Cal. 2d 807, 122 P.2d 892 (1942); compare *Blonder-Tongue Laboratories, Inc.* v. *University of Illinois Foundation*, 402 U.S. 313 (1971), with *Triplett* v. *Lowell*, 297 U.S. 638 (1936). The effect of the court of appeals' decision is thus to abolish the unmixed question of law rule announced in *Moser*. Of course, now that the mutuality requirement has been relaxed, the unmixed question exception necessarily extends to situations where the parties in successive actions are not the same. See Br. for the United States, at 20-25, *United States* v. *Mendoza*, No. 82-849 (cert. granted, Jan. 24, 1983) [redacted] (see page 22 note 12, *infra*).

arose out of the routine operation of EPA's oversight inspection program. And so far as we are aware (and respondent has not claimed otherwise) the fact that both inspections involve plants operated by respondent is pure coincidence. See page 21 note 11, *infra*. The attempt to inspect respondent's Mt. Pleasant, Tennessee facility commenced *before* the agency's attempt to inspect the Sage County, Wyoming plant. The cases arose on separate motions to quash two different search warrants issued by different federal courts. Thus, wherever the boundary of the unmixed question of law exception may lie, this case falls comfortably within it.[10]

For purposes of applying the unmixed question of law rule, it is also significant that this case and *Stauffer I* arose in different judicial circuits, which by tradition "can, and do, differ in their conclusions as to the law." *Frock* v. *United States Railroad Retirement Board*, 685 F.2d 1041, 1046 (7th Cir. 1982). See *American Medical International, Inc.* v. *Secretary of HEW*, 677 F.2d 118, 123 (D.C. Cir. 1981); see Vestal, *Relitigation by Federal Agencies: Conflict, Concurrency and Synthesis of Judicial Policies*, 55 N.C.L. Rev. 123, 140-163 (1977). This Court has repeatedly recognized the value of independent consideration of legal issues by the various courts of appeals. See, *e.g.*, *Califano* v. *Yamasaki*, 442 U.S. 682, 702 (1979); *E.I. duPont de Nemours & Co.* v. *Train*, 430 U.S. 112, 135 & n.20 (1977).

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[10] The examples employed in the *Restatement* to illustrate the scope of the unmixed question exception are illuminating. In successive actions for trademark infringement for consecutive time periods between identical parties, a judgment in the first action that the mark is invalid because of widespread generic usage is said to be conclusive on the same issue in a second action. By contrast, in successive personal injury damage actions against a municipality brought by a single plaintiff based on separate tortious acts, a judgment for the municipality on sovereign immunity grounds in the first action does not bar the plaintiff from arguing in the second (subject only to the constraints of stare decisis) that sovereign immunity should be rejected. *Restatement (Second) Judgments* § 28, illustrations 1 and 2 at 276. In functional terms this case resembles the later example, rather than the former, for the only identity between this case and *Stauffer I* lies in the identity of the parties and the legal issue.

Indeed, this Court's practice in exercising its certiorari jurisdiction assumes the recurrence of conflicting legal conclusions by those courts. Sup. Ct. R. 17.1. Yet, under the collateral estoppel rule adopted below, this Court, also, could be precluded from resolving such a conflict after it had arisen. Thus, it is especially inappropriate to treat cases arising in different judicial circuits that are linked only by commonality of parties and a purely legal issue as related for this purpose. See *Restatement (Second) of Judgments* § 28(3), at 273 (litigation not precluded when a "new determination of the issue is warranted by * * * factors relating to the allocation of jurisdiction" between two courts).

3. A comparison of this case with *Moser* confirms that the court of appeals misapprehended the distinction contemplated in *Moser*. To be sure, *Moser* itself was held to be controlled by the general rule of preclusion, rather than by the unmixed question of law exception to that rule recognized in the Court's opinion. 266 U.S. at 242. But the successive "demands" in *Moser* were claims for successive installments of a pension. *Id.* at 240. The transactions and facts underlying the successive actions were thus identical. Moreover, the consecutive actions all arose in the same court. Assuming no statute of limitations problems, if Moser had been content to bide his time, his successive claims could have been brought in a single action. Here, by contrast, the two cases arise from distinct transactions and neither of the two district courts had jurisdiction to entertain an application to quash the warrant issuing from the other. The question in *Moser*, moreover, was highly fact-bound, if not a mixed question of law and fact. As stated by the Court (266 U.S. at 242):

> [t]he question expressly and definitely presented in this suit is the same as that definitely and actually litigated in the * * * preceding suits, viz: whether [Moser] occupied the status of an officer who had served during the civil war.

Here on the other hand, the issue is purely one of law and does not turn in any respect upon the application of general principles to specific factual situations. Accordingly, this

case, unlike *Moser* itself, is governed by the unmixed question of law exception to collateral estoppel.

Nor, contrary to the view of the court of appeals, is this case controlled by the *holding* of *Montana*. There, as in *Moser*, the Court found the unmixed question of law exception inapplicable, observing: "the legal 'demands' of this litigation are closely aligned in time and *subject matter* to those in [the prior case]." 440 U.S. at 163 (emphasis added). But *Montana* demonstrates that a significant identity between successive cases in respects other than the parties and the legal issue must be found before a judgment on a question of law in the earlier case will be held to give rise to an estoppel in the latter case. In addition to identity of parties and issue, each of the successive actions considered in *Montana*, was a challenge to the application of a given state tax provision to federal contractors in Montana. The two cases were filed nearly simultaneously to vindicate the position of a single federal contractor, arising out of the contractor's activities in connection with a single federal dam project. Thus, the successive actions considered in *Montana* were related in substantial respects that have no analogue in this case.

It may also have been appropriate to treat the successive actions in *Montana* as arising from a single "demand" because there the government had engaged in conduct that may have implicated the core concerns underlying the preclusion doctrine. The United States had litigated the issue to a conclusion in the Supreme Court of Montana, noted an appeal to this Court, then dismissed the appeal and pursued a parallel action in the federal district court. The federal action, moreover, was filed just after the action in state court had been filed, and was stayed upon the government's stipulation pending resolution of the state court ligitation. Here, by contrast, the government made no such tactical decision to engage in duplicative litigation. Rather, these two cases arise from respondent's motions to quash separate search warrants that were routinely sought in the agency's performance of its statutory duty to enforce the Clean Air Act through the Section 114(a)(2) oversight inspection program. See page 17-18, *supra*. And respondent

invoked collateral estoppel for the first time upon *its* appeal from the district court's decision in this case upholding the agency's reading of Section 114(a)(2).[11]

4. In treating this case as one presenting the same "right or question" as that adjudicated in *Stauffer I*, the court of appeals failed to consider whether application of collateral estoppel was warranted in light of the twin purposes served by the preclusion doctrine: "protecting litigants from the burden of relitigating an identical issue with the same party or his privy" and "promoting judicial economy." *Parklane Hosiery Co.* v. *Shore*, *supra*, 439 U.S. at 326. At first galance, the first of these purposes might appear to be served by the court of appeals' decision. But, as is explained above, this case does not entail the "harassment of [an] adverse party" (*Restatement (Second) Judgments*, § 28, Reporter's Note at 286) that the rule was designed to prevent. Of course, if the mere possibility of redetermination of a legal question were prohibited, there could be no exception for unmixed questions of law. But where, as here, two actions lack any substantial relationship other than identity of parties and legal issue, the unmixed question of law doctrine reflects the view that "the more flexible principle of stare decisis is sufficient to protect the parties and the court from unnecessary burdens" while allowing for desirable development of the law. *Restatement (Second) Judgments*, § 28, comment b at 275-276.

Nor was judicial economy served by the court of appeals' approach. As a general matter, because the issue was purely legal, no trial type proceedings, or even elaborate factual submissions by affidavit, were needed to decide the parties' contentions. And the labor of deciding the legal question was substantially reduced because the issue had been fully addressed in the conflicting opinions of the Ninth and Tenth

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[11] Thus, there is no basis whatever for Judge Jones' suggestion (Pet. App. 38a) that EPA has deliberately embroiled respondent in multiple litigation in order to "test its policy decisions in more than a single circuit, in circumstances where the same defendant is sued *in seriatim* without the agency attempting to exhaust its appeals on the previous judgment."

Circuits, as well as in the opinion of the district court below. Thus, no substantial economy of judicial resources could have been achieved by resort to collateral estoppel. In any event, because a majority of the court of appeals actually reached the merits, collateral estoppel had none of the salutary effects usually assigned to the doctrine. The merits were briefed, argued, and decided. Neither the court of appeals, nor any of the parties was spared any labor or expense associated with a decision on the merits. See page 29 note 15, *infra*.

B. Collateral Estoppel Should Not Be Applied Against The Government To Preclude Determination Of Recurring Questions of Public Law

Any ambiguity in the application of the *Moser* exception to the issue preclusion doctrine is removed by consideration of the additional circumstances that set this case apart from *Montana*. As the Court there recognized, collateral estoppel is inapplicable whenever "special circumstances warrant an exception to the normal rules of preclusion." 440 U.S. at 155. See also *Parklane Hosiery Co.* v. *Shore*, *supra*, 439 U.S. at 331. We submit that the special attributes and role of the United States as a litigant strongly militate against application of the issue preclusion doctrine to the government, particularly when it is engaged in the uniquely sovereign function of enforcing the public law that governs the legal relationships of federal agencies with broad classes of similarly situated persons or businesses.[12]

1. First, unlike cases involving only private litigants, application of the issue preclusion doctrine in cases involving the United States must take account of the unique public interest in the uniform and rigorous enforcement of laws of

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[12] Because neither the court of appeals nor respondent appears to have quarreled with this general proposition, but only with its application to issues previously litigated between the same parties (see page 26, *infra*), and because the broader question is fully addressed in our brief in *United States* v. *Mendoza*, No. 82-849 (at pages 25-36), which presents a closely related question, we present this argument in somewhat abbreviated form here. A copy of our brief in *Mendoza*, to which we refer the Court, has previously been provided to counsel for respondent.

general importance and applicability. See *Standefer* v. *United States*, 447 U.S. 10, 24-25 (1980). The fact that this case, unlike *Standefer*, is not a criminal prosecution does not dilute the strength of the policy considerations there recognized. Whenever the government acts in its sovereign capacity to enforce the public laws, public policy dictates the applicability of the *Standefer* analysis. As the Court emphasized in *INS* v. *Hibi*, 414 U.S. 5, 8 (1973): "[T]he Government is not in a position identical to that of a private litigant with respect to its enforcement of laws enacted by Congress." Rather, the government "is enforcing public policy established by Congress." *Ibid.*

Significant practical and legal considerations, applicable in criminal and non-criminal cases alike, also set the United States apart from any other litigant and argue strongly against the estoppel invoked by the court of appeals. First, the government is involved in far more litigation than any other party. Second, many of the issues of greatest public importance arise only in litigation to which the government is a party; others are characteristically associated with government litigation. See *American Medical International, Inc.* v. *Secretary of HEW*, *supra*, 677 F.2d at 121 n.24. Third, the government, unlike other litigants, necessarily finds itself in litigation presenting a particular legal issue in a host of jurisdictions. In such cases, which include the present one, there is special potential for unfairness in the application of the issue preclusion doctrine to questions of law for there is substantial likelihood that in litigating a recurring issue, the government will at some point encounter an adverse decision.

Because of these unique attributes of government litigation, application of collateral estoppel in the circumstances of cases such as the present one would substantially disrupt the existing process of development of the public law. For better or for worse, courts of coordinate rank are not bound by each other's decisions on questions of law, even as a matter of stare decisis (see page 18, *supra*) and, in practice, often disagree. The upshot is that the law emerges through the hierarchical process of appeal, en banc review and, in proper cases, certiorari.

Issue preclusion in private litigation—even if extended to legal questions—ordinarily does not unduly undermine this process of development of the law because no single litigant is party to more than a small fraction of factually unrelated cases presenting a common legal question. By contrast, the government is characteristically, if not invariably, a party to litigation on public law questions. Accordingly, application of collateral estoppel when the government has unsuccessfully litigated a question of law in any court inferior to this one would freeze the development of the law.

2. Invocation of collateral estoppel against the government on recurring questions of public law is inappropriate for the additional reason that the government, through the Office of the Solicitor General, employs a unique formal mechanism for determining whether to take an appeal from or seek certiorari review of an adverse judgment. See 28 C.F.R. 0.20. This process is uniquely selective, particularly at the certiorari stage. Moreover, to a degree not approached by any private party, the government regularly takes into account factors other than its parochial interest in prevailing in a particular lawsuit in determining whether to seek further judicial review. As a result, the Solicitor General frequently decides against appeal or certiorari in cases where the legal conclusions of the deciding court are believed to be erroneous. Such decisions rest upon a host of other considerations, including: a substantial measure of prosecutorial discretion, equitable and policy considerations, the perceived practical importance of the decision, recognition of the limited resources of the government, sensitivity to the crowded dockets of the courts, and, in the case of applications for further review in this Court, the Court's announced criteria for granting certiorari. Because of the substantial volume of government litigation, and the substantial share of this Court's limited docket already occupied by government cases, self-restraint is particularly necessary in connection with filing of petitions for a writ of certiorari.

This case well illustrates these consideration. The court of appeals faulted the government for its failure to seek

certiorari review in *Stauffer I* (Pet. App. 12a). But at the time a petition could have been filed there was no conflicting decision of any court of appeals. Moreover, the pendency in the Ninth Circuit of *Bunker Hill*, an appeal from a district court decision favorable to the government, as well as the pendency of respondent's appeal to the Sixth Circuit from the district court's decision favorable to the government in this case, necessarily counseled against application to this Court for further review in *Stauffer I*. Any other course would have ignored this Court's announced certiorari practices, see Sup. Ct. R. 17.1(a), and would have disserved both the Court and those litigants who compete for a place on its crowded docket.[13]

The government's practice of selective pursuit of appellate review benefits the public interest and facilitates sound judicial management. Adoption of the preclusion rule applied by the court of appeals would compel the United States to reconsider this salutary practice. Instead, the government would be obliged to consider an inflexible policy of appealing (and even seeking certiorari on) the first adverse decision rendered on a legal issue. As a result, the courts of appeals and this Court especially would be burdened prematurely and unnecessarily, and judicial economy—the touchstone of the preclusion doctrine—would be disserved. Moreover, because of the limited docket of this Court, and the proliferation of statutes and litigation in recent years, constructions of the law that this Court might ultimately determine to be erroneous would more often be given finality. Plainly, there is no interest served by invo-

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[13] We are puzzled as to what significance the court of appeals would have attached to a denial of certiorari had the government filed a petition in *Stauffer I*. Treating a denial of certiorari as confirming the preclusive effect of a court of appeals' judgment would be in tension with the traditional rule that a denial of certiorari has no precedential effect and would burden this Court's decisions respecting grant of certiorari with unwarranted consequences. But a rule that denial of certiorari would relieve a party of the preclusive effect of an adverse court of appeals' judgment would create an inappropriate incentive for filing of petitions that do not conform to the Court's criteria for review.

cation of collateral estoppel in the circumstances of this case that would justify these detrimental consequences.

3. The courts of appeals generally have recognized that these considerations preclude application of collateral estoppel to the government on recurring legal issues. *American Medical International, Inc.* v. *Secretary of HEW*, *supra*, 677 F.2d at 121-124; *Western Oil & Gas Ass'n* v. *EPA*, 633 F.2d 803, 808 (9th Cir. 1980); *Olegario* v. *United States*, 629 F.2d 204, 215 (1980); *Divine* v. *Commissioner*, 500 F.2d 1041 (2d Cir. 1974). The American Law Institute also has recognized that preclusion is inappropriate when

> The issue is one of law and treating it as conclusively determined would inappropriately foreclose opportunity for obtaining reconsideration of the legal rule upon which it was based * * *.

Restatement (Second) of Judgments § 29(7). Thus, when "the party against whom the rule of preclusion is to be applied is a government agency responsible for continuing administration of a body of law applicable to many similarly situated persons * * * the rule of preclusion should ordinarily be superseded by the less limiting principle of *stare decisis*." *Id.* at § 29 comment i; see also *id.* at § 28(2) & comment c.

C. Identity of Parties in Successive Cases Does Not Justify Application of Collateral Estoppel on Recurring Questions of Public Law

The court of appeals evidently concluded that the foregoing principles had no application in the setting of this case because respondent was the party adverse to the government in *Stauffer I* as well as in the present case (Pet. App. 11a, 12a-13a (opinion of Weick, J.); *id.* at 37a-38a (opinion of Jones, J.)). Respondent, too, appears to rely upon that distinction. Memo. in Opp. 7, 8-9 & n.11.

1. Like respondent (Memo. in Opp. 7), we acknowledge that, even after the demise of the strict rule of mutuality of estoppel (see page 17 note 9, *supra*), identity of parties remains a relevant consideration in applying collateral estoppel to particular cases. When issues are litigated between parties that have previously litigated them, a party ordinarily cannot claim surprise when it finds itself bound

by pertinent determinations necessary to a judgment rendered against it, even on a different cause of action, if neither the factual nor the legal setting has changed in the interim. See *Montana* v. *United States*, *supra*, 440 U.S. at 158-162; *American Medical International, Inc.* v. *Secretary of HEW*, *supra*, 667 F.2d at 121 n.24, 124 & n.46. Even so, as explained above (pages 15-22), invocation of collateral estoppel to govern unmixed questions of law arising in factually distinct cases remains inappropriate, and in such cases the alternative doctrine of stare decisis is a sufficient bulwark against repeated litigation and undue demands upon judicial resources. But the factors that counsel against application of collateral estoppel to unmixed questions of law apply with special force in government litigation where, as here, the issue is a recurring one of public law that applies to a significant class of similarly situated persons. In such cases, resort to collateral estoppel would improperly afford the party that happened to be involved in the prior case decided against the government a favored position in the administration of law. As Judge Siler explained below (Pet. App. 40a-41a):

> Here, injustice would result if EPA were precluded from entering with private contractors at Stauffer's plant in Tennessee, but were using private contractors in entering competitors' plants in the same area.

The undesirability of applying collateral estoppel in this setting has been recognized by commentators. As the American Law Institute has stated (*Restatement (Second) of Judgments*, § 28):

> [R]elitigation of [an] issue [previously determined] in a subsequent action between the parties is not precluded [when]:
>
> * * * * *
>
> (2) The issue is one of law and * * * a new determination is warranted in order to * * * avoid inequitable administration of the laws * * *.

In this connection the authors of the *Restatement* explain (*id.* at comment c, at 278):

> [I]t can be particularly significant that one of the parties is a government agency responsible for continuing administration of a body of law that affects members of

> the public generally, as in the case of tax law. Refusal of preclusion is ordinarily justified if the effect of applying preclusion is to give one person a favored position in current administration of current law.

Accord: *American Medical International, Inc.* v. *Secretary of HEW*, *supra*, 677 F.2d at 124. As Judge Siler appreciated, this case is a striking example of the problem recognized by the *Restatement*. This case arises from EPA's Region IV, one of 10 such administrative units. Approximately 4600 major stationary pollution sources subject to inspection under the "overview inspection program" are located in eight state areas encompassed in Region IV alone (Pet. App. 59a). Roughly 10% of these sources are likely to be inspected annually under this program. Thus, on a nationwide basis, thousands of businesses are affected each year by the question of contractor participation in Section 114 inspections. It accordingly would be anomalous indeed to create—through invocation of collateral estoppel—a special private law applying to respondent alone on this question of statutory interpretation.

Contrary to Judge Jones' suggestion (Pet. App. 36a), it is no answer to observe that refusal to apply collateral estoppel will entail a different kind of disparity in the application of the laws—one that depends upon geography. First, the doctrine of stare decisis and the persuasive force of the decision of courts of coordinate or inferior rank will, in the long run, at least, minimize such "inequities." And it is uniquely the province of this Court to act as final arbiter of any issues that divide the courts of appeals. The short-term unevenness of result permitted by redetermination of recurring questions of public law by coordinate courts is, moreover, essentially inoffensive. It is a natural result of the operation of a system of lower courts with limited geographic jurisdiction, and a Supreme Court with control over its limited docket.

On the other hand, application of different rules of law to persons similarly situated resulting from collateral estoppel is in tension with fundamental values of equal justice. Compromise of those values is ordinarily warranted by the competing desiderata of judicial economy, protection of par-

ties against multiple lawsuits, and the role that issue preclusion plays in minimizing inconsistent judgments. See *Montana* v. *United States*, *supra*, 440 U.S. at 153-154. But as we have explained above (pages 21-22), none of these competing objectives is advanced by application of collateral estoppel in a setting such as the present one. And where, as here, the decision afforded preclusive effect is itself inconsistent with the decision of another court of coordinate rank, invocation of collateral estoppel plainly cannot eliminate inconsistent judgments. The burden of multiple lawsuits, moreover, is a significantly less weighty consideration where, as here, multiple litigation arises from a federal agency's duty to apply a uniform interpretation of a statute applicable to a host of similarly-situated parties. By engaging in a regulated business within the various judicial circuits, each of which is ordinarily free (subject only to this Court's decisions) to interpret statutes for itself, respondent subjected itself to the possibility that it would become engaged in parallel litigation presenting a common legal question (see pages 17-18, and page 21 note 11, *supra*). [14] Thus, the inequity that would result from application of collateral estoppel in this case is substantially more troublesome from the point of view of the fair administration of justice than the possibility of conflicts among the circuits perceived by Judge Jones.[15]

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[14] We note that respondent operates plants in 30 states, spanning 11 of the 12 judicial circuits. See [redacted] 2 Moody's Industrial Manual 5985 (1982). Because 10% of major pollution sources are inspected by EPA annually (see page 2 note 1), it is not in the least remarkable that respondent has encountered the legal issue presented here more than once. Eighteen of respondent's plants are located within the Ninth Circuit. Query whether under the Sixth Circuit's analysis EPA is obliged to follow *Stauffer I* with respect to these plants, notwithstanding the Ninth Circuit's contrary decision in *Bunker Hill*. If so, the resulting discrepancy in the administration of the laws is substantial indeed.

[15] Nor does Judge Jones' suggestion (Pet. App. 37a) that the inequity produced by application of collateral estoppel is illusory here because a majority of the court reached the merits, *support* the application of collateral estoppel. Because a majority of the court of appeals relied upon collateral estoppel, there was no reason for the court to reach the merits. See *Montana* v. *United States*, *supra*, 440 U.S. at

2. The fact that the parties in this case and *Stauffer I* are identical cannot justify application of collateral estoppel for yet another reason. At the time when the Solicitor General decides whether to authorize an appeal, or whether to seek review in this Court of an adverse judgment, it typically is impossible to determine whether future litigation will arise in a case involving the same party or a different party. The Solicitor General's decision—particularly respecting whether to seek certiorari—must turn instead upon the general importance of the issue, the existence of a conflict and the other criteria traditionally applied by this Court. If the United States is to be bound in future litigation with the adverse party, however, the mere possibility of future litigation with the same party militates powerfully in favor of further review in many cases that otherwise do not warrant that extraordinary step.

3. We have already explained (pages 20-21) why this case is not controlled by the holding of *Montana* v. *United States*, *supra*. We add here only that the Court's decision in *Montana* cannot be understood to discount the policy and practical considerations we have outlined that affect issue preclusion in government litigation. These factors had little application in *Montana*. The issue presented there could arise only in two forums (setting to one side this Court's original jurisdiction)—the Montana state courts and the United States District Court for Montana. There thus was little basis for concern respecting impairment of the development of the law. And because the record reflected a deliberate effort to pursue parallel litigation on indistinguishable claims (see page 20, *supra*), there was less reason to defer to the Solicitor General's selective appeal policy. More importantly, perhaps, the underlying legal question presented, while of undoubted importance to the United States, did not affect a class of similarly situated persons, but only the proprietary interests of the litigants. There

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152-153; cf. *Bowen* v. *United States*, 422 U.S. 916, 920 (1975). Conversely, because a separate majority reached the merits, invocation of collateral estoppel could have none of the salutary effects assigned for the doctrine generally. See page 21-22, *supra*.

was accordingly no occasion for the United States to argue in *Montana*, as it does here, that the application of the preclusion doctrines was inappropriate in light of the government's special attributes and responsibilities. The Court's opinion thus does not reflect any view adverse to our present contentions.

D. Other Considerations Weigh Against Application of Collateral Estoppel in the Setting of this Case

Two other factors militate against the estoppel recognized by the court of appeals. First is the Ninth Circuit's decision in *Bunker Hill Co.* v. *EPA*, *supra*, that conflicts with *Stauffer I*.[16] *Parklane Hosiery Co.* v. *Shore*, *supra*, 439 U.S. at 330 & n.14. In view of the conflicting precedents that confronted it, the court of appeals should simply have given each decision of a coordinate court such persuasive force as it warranted, rather than resorting to the rigid artificial rule of collateral estoppel to elevate one of those prior decisions above the other.

Reliance upon collateral estoppel with respect to legal issues is, moreover, particularly inappropriate in the context of the difficult questions of statutory interpretation that arise under our complex environmental laws. See, *E.I. duPont de Nemours & Co.* v. *Train*, 430 U.S. 112, 135 & n.26 (1977); *Western Oil & Gas Ass'n* v. *EPA*, *supra*, 633 F.2d at 808. This Court frequently has entered into such controversies only after a substantial accumulation of appellate jurisprudence. See, *e.g.*, *Union Electric Co.* v. *EPA*, 427 U.S. 246, 254-255 (1976); *Train* v. *NRDC*, 421 U.S. 60, 72-75 (1975). This practice may be based in part upon the provisions of the major environmental statutes assigning jurisdiction to address certain claims upon a geographical basis, while others are treated as matters of national concern. See, *e.g.*, 33 U.S.C. 1369(b) (Clean Water Act); 42 U.S.C. (Supp. V) 7607(b)(1) (Clean Air Act).[17] But

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[16] See also pages 3-4 note 2.

[17] On those rare occasions when Congress has wished to make the decision of a single court of appeals respecting a particular issue final save only for review by this Court, it has done so explicitly, by desig-

even where such explicit statutory provision is not made, questions of law under the environmental control statutes are capable of arising in every jurisdiction. It appears particularly inappropriate to import the rigid issue-preclusion doctrine into this area in a fashion that would undercut the traditional independence of the circuits. Moreover, because of the prominent role in environmental litigation of large industrial corporations, national trade associations and national environmental advocacy groups, many of which do business or conduct litigation in manifold jurisdictions, any rule that assigns controlling weight to the identity of parties in determining the applicability of collateral estoppel in this setting provides an undesirable incentive for forum shopping, and also fosters indefensible inequities in the administration of the law to similarly-situated parties.[18]

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nating a single forum for litigation of questions of nationwide importance. In addition to Section 307(b)(1) of the Clean Air Act, 42 U.S.C. (Supp. V) 7607(b)(1), see Section 211(b)(1) of the Economic Stabilization Act of 1970, 12 U.S.C. 1904 note. Cf. Section 526(a)(1) of the Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. (Supp. V) 1276(a)(1).

[18] By way of illustration, we note that United States Steel Corporation challenged the EPA's failure to comply with the notice and comment requirements of 5 U.S.C. 553 in promulgating final rules designating various areas as exceeding national ambient air quality standards for total suspended particulates in the Fifth Circuit, *United States Steel Corp.* v. *EPA*, 595 F.2d 207, modified, 598 F.2d 915 (1979), the Seventh Circuit, *United States Steel Corp.* v. *EPA*, 605 F.2d 283 (1979), cert. denied, 444 U.S. 1035 (1980), and in the Eighth Circuit, *United States Steel Corp.* v. *EPA*, 649 F.2d 572 (1981). Other companies challenged the EPA's procedure in the Third Circuit, *Sharon Steel Corp.* v. *EPA*, 597 F.2d 377 (1979), the Sixth Circuit, *Republic Steel Corp.* v. *Costle*, 621 F.2d 797 (1980), the Ninth Circuit, *Western Oil & Gas Ass'n* v. *EPA*, *supra*, and the District of Columbia Circuit, *New Jersey Department of Environmental Protection* v. *EPA*, 626 F.2d 1038 (1980). It would have been anomalous in the extreme for the result in any of those cases to have turned upon the presence or absence of a particular party—United States Steel.

II. UNDER SECTION 114(a)(2) OF THE CLEAN AIR ACT, A CONTRACTOR DESIGNATED AS AN "AUTHORIZED REPRESENTATIVE" BY THE EPA ADMINISTRATOR MAY PARTICIPATE IN AGENCY INSPECTIONS OF STATIONARY AIR POLLUTION SOURCES

Section 114 of the Clean Air Act was originally enacted in 1970 as part of the comprehensive Clean Air Amendments of that year, 84 Stat. 1687-1688, to the pre-existing federal air pollution legislation. Section 114(a), which remains today substantially in the form enacted in 1970, advances the congressional purpose "to protect and enhance the quality of the Nation's air resources" (42 U.S.C. (Supp. V) 7401(b)(1)), in two important respects. Section 114(a)(1) authorizes EPA to require owners or operators of stationary emission sources to carry out a program of emission monitoring and to maintain emission records. Section 114(a)(2) empowers "the Administrator or his authorized representative, upon presentation of his credentials "to enter upon the premises of such an operator to copy records, inspect monitoring equipment or sample emissions." The issue in this branch of this case is simply whether, as the court of appeals held (Pet. App. 33a) "the words 'authorized representative' in Section 114(a)(2) * * * mean officers or employees of the EPA, and cannot include employees of private contractors."

A. Statutory Language and Legislative History Indicate That the Administrator is Authorized to Secure Contractor Assistance for Stationary Source Inspections

1. We began with the language of the statute directly in issue. See *United States* v. *Turkette*, 452 U.S. 576, 580 (1981). Section 114(a)(2) empowers "the Administrator or his authorized representative" to enter upon the site of a stationary pollution source for the purpose of sampling emissions. Because the term "authorized representative" is nowhere defined in the Clean Air Act, there is no reason to believe that Congress intended that it be assigned a special limited meaning. Rather, the statutory terms should be assigned "their usual and ordinary sense" (*Caminetti* v. *United States*, 242 U.S. 470, 485-486 (1917)).

As the Ninth Circuit observed in *Bunker Hill Co.* v. *EPA*, *supra*, 658 F.2d at 1283, the common understanding of the terms employed by Congress in Section 114(a)(2) compels the conclusion that a duly designated contractor qualifies to participate in an EPA stationary source inspection. The dictionary teaches that "authorize" means "to endow with authority or effective legal power" and that "authorized" means "endowed with authority." *Webster's Third New International Dictionary* 146, 147 (1976).[19] A "representative" is one who "respresents another as agent, deputy, substitute or delegate, usu[ally] being invested with the power of the principal." *Id.* at 1926-1927. The term representative is thus defined in functional terms, resting upon the concept of agency, and does not carry any implication of an employment relationship. Accordingly, a contractor specially retained by the EPA Administrator for the purpose of providing technical support to agency employees in a stationary source inspection qualifies as an "authorized representative" and may participate in the inspection.[20]

2.a. As the district court recognized, consideration of related provisions of the Clean Air Act supports the agency's interpetation of Section 114(a)(2). The district court observed (Pet. App. 47a-48a):

> Section 114 contains two references to "authorized representatives." In addition to subsection (a)(2), sub-

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[19] There is no question in this case as to whether the Administrator duly authorized PEDCo personnel to participate in the inspection of respondent's premises or whether that authorization was evidenced by credentials carried by the PEDCo personnel.

[20] Indeed, the court of appeals acknowledged (Pet. App. 22a) that "the plain meaning of 'representative,' " is "one standing or acting for another through delegated authority," but declined to apply that plain meaning in this case. See page 39, *infra*.

Comparison of this case with *NLRB* v. *Amax Coal Co.*, 453 U.S. 322 (1981), is instructive. There the court held that certain employer-selected trustees of union pension fund are not "representatives" of the employer for specified purposes under the National Labor Relations Act because the trustees' duties were inconsistent with any notion that they served as agents of the employer's interests. *Id.* at 329-330, 332-334.

> section (c) allows confidential information obtained under subsection (a) to be disclosed to "other *officers, employees, or authorized representatives* of the United States concerned with carrying out this Act." 42 U.S.C. § 7414(c) (emphasis added). That Congress intended authorized representatives to be distinguishable from officers and employees is obvious from the disjunctive listing in this section. If authorized representatives were limited to officers or employees, the inclusion of authorized representatives in this subsection would have been mere surplusage. The Court will not conclude that Congress intended to be redundant.

The district court (and the court of appeals) correctly appreciated that Section 114(c) necessarily sanctions disclosure of information gathered in inspections to designated agency contractors for use in the performance of their duties, for the use of the disjunctive "*or*" clearly indicates that Congress extended this authority beyond officers and employees of the United States. See *Reiter* v. *Sonotone Corp.*, 442 U.S. 330, 338-339 (1979).[21] There is simply no reason to believe that Congress intended to assign the term "authorized representative" a different meaning in Section 114(a)(2), for the two provisions are intimately related and were enacted simultaneously. Such an intent is not to be attributed to Congress absent compelling support in legislative history and only in circumstances where a consistent interpretation of the statutory language leads to "absurd or futile results." *Mohasco Corp.* v. *Silver*, 447 U.S. 807, 818 (1980), quoting *United States* v. *American Trucking Assn's*, 310 U.S. 534, 543 (1940).[22]

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[21] Respondent appears to suggest (Memo. in Opp. 12 n.16), halfheartedly, that Section 114(c) may be intended to cover "federal judges, attorneys at the Department of Justice and U.S. Attorneys, and Coast Guard officers and officials." But all of the persons suggested are officers and employees of the United States. Even if it were assumed that federal judges were not to be treated literally as officers of the United States, Section 114(c) separately authorizes disclosure of inspection data "when relevant in any proceeding" under the Clean Air Act. Plainly, Section 114(c) must extend to persons other than government employees.

[22] We note that, contrary to the court of appeals' suggestion (Pet. App. 22a), an interpretation of the term "representative" employed in

b. Instead of interpreting Section 114(a)(2) in conformity with the plain meaning of the identical language of Section 114(c), the court of appeals unaccountably focused upon Section 114(d) of the Clean Air Act, which requires "the Administrator (or his representatives)" to provide reasonable notice to the concerned state air pollution control agency before carrying out an inspection under Section 114(a)(2) in certain circumstances. The court of appeals reasoned (Pet. App. 20a-21a) that giving the notice required by Section 114(d) entails "sensitive intergovernmental communication" that Congress simply could not have intended to entrust to private contractors. That analysis, however, is flawed in numerous respects. First, Section 114(d) was added to the Clean Air Act by 1977 amendments,[23] and accordingly sheds no light upon the intentions of the 87th Congress that adopted both Section 114(a)(2) and Section 114(c) in 1970. Given the actual chronology, the district court's reliance upon Section 114(c) in interpreting Section 114(a)(2) was plainly warranted, while the court of appeals' reliance on Section 114(d) was not. The weight to be attached to Section 114(c) is enhanced, moreover, by the fact that both that subsection and Section 114(a)(2) employ precisely the same language—"authorized representative"—while Section 114(d) speaks only of the Administrator's "representative."

Second and more fundamental, while we may well agree that it is preferable as a matter of policy for EPA to limit intergovernmental communications to regular government employees or officers—as it does, the court of appeals' reading of Section 114(d) is unsupported by any statutory lan-

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Section 114(c) that *includes* persons other than agency employees does not suggest that inspections under Section 114(a)(2) may only be carried out by non-employees or the Administrator acting in person.

In any event, Section 301 of the Clean Air Act authorizes the Administrator to delegate any of his duties, except for rulemaking, to agency employees. In light of the availability of Section 301, the court of appeals' decision limiting the class of "authorized representatives" under Section 114(a)(2) to agency employees renders that language surplusage.

[23] Clean Air Act Amendments of 1977, Pub. L. No. 95-95, Section 113, 91 Stat. 709.

guage or legislative history.[24] Absent any actual indication of congressional intent, it is more reasonable to assume that Congress was content to rely upon EPA's prudence upon this point. "Only when a literal construction of a statute yields results so manifestly unreasonable that they could not fairly be attributed to congressional design will an exception to statutory language be judicially implied." *United States* v. *Rutherford*, 442 U.S. 544, 555 (1979). In any event, the Court is not asked to decide whether EPA may use contractors to give notices under Section 114(d). However that may be, there is no warrant for interpreting Section 114(a)(2) in light of an intent respecting a different provision of law, enacted at a later date, that has been imputed to Congress without any support in the legislative record.

This is especially so because whatever policies might underlie a restrictive implementation of Section 114(d) have no application in the setting of Section 114(a)(2). The notice function contemplated by Section 114(d) appears to be purely ministerial in nature; no technical expertise is needed. And the decision to undertake a particular inspection is inherently governmental in nature. By contrast, the role fulfilled by EPA contractor-representatives that assist agency employees in stationary source inspections is purely technical. There is no reason for Congress to have assumed that the necessary expertise would, in every instance be available among agency personnel in the necessary location (see page 4, *infra*). Thus participation by specially chosen contractor personnel is wholly appropriate.

Respondent argues (Memo. in Opp. 13), however, that "absent specific direction by Congress," the inspections of the kind involved here should be carried out by government officials because they amount to searches. Although

[24] The legislative history reflects that Congress simply did not focus on this issue. See H.R. Conf. Rep. No. 95-564, 95th Cong., 1st Sess. 135-136 (1977). The Conference Report does make clear that Congress sanctioned informal procedures in this connection, stating that "oral notice would be permitted." *Id.* at 136. The Conference Report also underscores (at 136) that Section 114(d) was "intended to be a protection for States, not for [pollution] sources."

the cases cited by respondent do not in fact support the stated proposition,[25] we may assume that it is generally correct. But see 18 U.S.C. 3105 (allowing persons other than officers authorized by law to *assist* such an officer in serving a search warrant). But, the authority claimed by the Administrator is merely to avail himself of technical assistance in carrying out stationary source inspections. The policies that apply to conventional governmental searches accordingly have no application here. In any event, as we have explained, Congress' intent regarding the issue in this case is clear. Of particular importance in this respect is the provision in Section 114(c) of the Act authorizing the Administrator to disclose information gathered in Section 114(a)(2) inspections to contractor-representatives for use in connection with the purposes of the Act, notwithstanding the fact that the data may include trade secrets or other proprietary information. The significance of this fact is twofold. First, Congress plainly did not regard this area as one governed by policies that require performance of all roles by government employees. Second, given that the Agency unquestionably is authorized to use its own personnel to collect data during inspections, and is free then to turn these data over to contractors whose assistance is needed for analysis, it would be pointless to preclude contractor participation in data collection itself.[26]

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[25] Indeed, *Steele* v. *United States No. 2*, 267 U.S. 505 (1925), *rejects* artificial or overly technical limits upon the scope of a statutory grant of search authority, as does *United States* v. *Gannon*, 201 F. Supp. 68 (D. Mass. 1961).

[26] In any event, contrary to respondent's assumption, this case does not present the question whether EPA contractor-representatives may be authorized to "execute[e] search warrants" (Memo in Opp. 13). The warrant at issue *in this case* runs in favor of:

> EPA, through its duly authorized full-time employees and *accompanying*, authorized representatives under contract with EPA.

Pet. App. 45a (emphasis added). See also *Stauffer I*, *supra*, 647 F.2d at 1076-1077 (same limitation). We emphasize that Section 114(a)(2) requires the Administrator's representative to present proper credentials in order to gain entry to a source's premises.

c. The court of appeals' reliance upon its reading of Section 114(d) led it to adopt a Byzantine interpretation of Section 114 as a whole (Pet. App. 22a):

> [T]he only logical conclusion is that the word "representative" as used in section 114 of the Clean Air Act means EPA officers or employees, unless the latter are already enumerated, as they are in section 114(c). In that event, the plain meaning of "representative," i.e., one standing or acting for another through delegated authority, controls. We realize that this leads to the undesirable result that the word "representative" has different meanings in different portions of the statute * * *.

The court of appeals' view that this result is simply unavoidable is entirely unfounded.

3.a. The only explanation offered by the court of appeals for declining to follow the plain language of Section 114(a)(2) was that "plain meaning * * * is not always decisive * * * especially * * * when the legislative history suggests a different interpretation" (Pet. App. 17a). But the court failed to identify anything in the pertinent legislative history that significantly supports its reading of the statute. Indeed, what little light is shed by the legislative history, supports the agency's position.

The Clean Air Act, as amended in 1967, granted very little federal enforcement authority. No right of entry to stationary sources was provided. The Secretary of HEW was authorized only to require submission of emission reports on such sources. Section 108(j), 42 U.S.C. (Supp. III 1964 ed.) 1857d(j). By contrast, Section 207(a) of the 1967 Act provided for access by an "officer or employee" of the Secretary to the records of motor vehicle manufacturers, 42 U.S.C. (Supp. III 1964 ed.) 1857f-6(a). Both the House of Representatives and the Senate proposed to add stationary source inspection authority to the Clean Air Act when a federal enforcement role was authorized in the 1970 Amendments to the Act. Section 5(a) of the House Bill, H.R. 17255, 91st Cong. 2d Sess. (1970) would have added Section 112(f) to the Act, granting the right to enter and inspect stationary sources, but only to "officers or employees duly designated by the Secretary [of HEW] upon present-

ing appropriate credentials and a written notice to the owner or person in charge * * *." *A Legislative History of the Clean Air Act Amendments of 1970*, 93d Cong., 2d Sess. 923 (Comm. Print 1974) ("Leg. Hist."). The Senate bill, S. 4358, 91st Cong., 2d Sess. (1970), generally granted more expansive inspection authority than its House counterpart. For example, Section 115 of the Clean Air Act as proposed in the Senate bill significantly broadened the basis upon which inspections could be made, deleted the House requirement of written notification, and deleted the House requirement that inspections be completed with reasonable promptness. More pertinently, proposed new Section 116(a)(3) of the Senate bill provided that "the Secretary or his authorized representative" could inspect both stationary sources and motor vehicle manufacturers' premises. *Leg. Hist.* at 570.

In conference, the Senate's language was adopted for stationary source inspectons, *Leg. Hist.* at 163, 198,[27] while the more limited House version, based on the 1967 Act, survived for motor vehicle manufacturers. The Conference Committee's adoption of the more expansive Senate version of Section 114(a)(2) of the Act thus evidenced Congress' deliberate intent to make a distinction, *i.e.*, to grant broader rights of entry to the Administrator than the House version would have allowed. Otherwise, no change of words would have been warranted. See *Gulf Oil Corp.* v. *Copp Paving Co.*, 419 U.S. 186, 199-200 (1974).

b. The court of appeals, however, discounted this legislative history, in large measure because the legislative reports do not focus upon the difference between the language employed in the House and Senate bills (Pet. App. 19a, 20a). But Congress has no obligation to recognize in legislative history the effect of what it has established through direct statutory language. See *Harrison* v. *PPG Industries, Inc.*, 446 U.S. 578, 592 (1980); cf. *EEOC* v. *Wyoming*, No. 81-554 (Mar. 2, 1983), slip op. 16 n.18. In any event, Congress' failure to create controlling legislative

[27] "The provisions of the conference substitute with regard to inspections, monitoring and entry follow substantially the provisions of the Senate amendment." *Leg. Hist.* at 198.

history cannot dislodge the effect of the statutory language itself.

The court of appeals also relied (Pet. App. 20a) upon the thumb-nail descriptions of the respective House and Senate bills contained in the Conference Report that referred respectively to entry by "DHEW personnel" and "DHEW investigative personnel." See pages 8-9, *supra*. But, as the Ninth Circuit emphasized in *Bunker Hill*, *supra*, 658 F.2d at 1283-1284, the Conference Report simply does not focus on the identity of persons authorized to make inspections, and the casual descriptions of the two bills employed in the Report simply reflect no view on the question at issue.[28]

c. In any event, Congress' intent affirmatively to distinguish between "authorized representatives" and "officers and employees" emerges clearly from cognate provisions of the statutory language. When Congress intended the right of entry to be limited to EPA's officers and employees, it knew how to say so. Thus, in Sections 206(c) and 208, the mobile sources provisions of the Act, 42 U.S.C. (Supp. V) 7525(c) and 7542, Congress retained the use of the more restrictive term "officers and employees" for inspection of motor vehicle manufacturer's facilities and records, exempting such facilities from the operation of Section 114. Congress could easily have repeated in Section 114 the language of the section dealing with inspections of motor vehicle manufacturers, but chose not to do so. The broader term "authorized representatives" was thus deliberately chosen by Congress.

The court of appeals recognized the difference in statutory language between the stationary source provisions of the Clean Air Act and the motor vehicle manufacturing plant provisions (Pet. App. 23a). Nevertheless, without adducing any support in the legislative history, that court interpreted Section 114(a)(2) to conform to Sections 206(c) and 208 of the Act, reasoning that the maintenance of different rules would be "illogical and inconsistent" (Pet. App. 25a).

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[28] The term "DHEW personnel" is not, in any event, a term with a defined legal significance; it may without difficulty be read to embrace persons retained on contract as well as government employees.

But there is no suggestion of a denial of equal protection of the laws here and any such contention would be frivolous. Accordingly the court of appeals' analysis forgets that "[u]nder our constitutional framework, federal courts do not sit as councils of revision, empowered to rewrite legislation in accord with their own conceptions of prudent policy." *United States* v. *Rutherford*, *supra*, 442 U.S. at 555.[29]

d. As noted above (page 10 & note 7), the court of appeals relied heavily (Pet. App. 26a-29a) upon legislative history of an entirely different statute, the Clean Water Act. Despite the near identity of Section 308(a)(B) of the Clean Water Act, 33 U.S.C. 1318(a)(B), and Section 114(a)(2), that reliance was misplaced. First, it is fundamental that the legislative history of a subsequently enacted statute offers little, if any, help in interpreting an earlier enactment. *Consumer Product Safety Commision* v. *GTE Sylvania, Inc.*, 447 U.S. 102, 118 n.13 (1980). To be sure, in relying upon the Senate Report on the Clean Water Act Amendments of 1972, the Sixth Circuit emphasized that both the Clean Air and Water Acts were reported out of the same Senate committee (Public Works) (Pet. App. 28a). Yet, in 1980, that same committee, when considering the "Superfund" legislation, S. 1480, 96th Cong., 1st Sess. (1979), the proposed Environmental Emergency Response Act,[30] wrote:

> To implement the site and facility investigation and response authorities contemplated by this bill, the Ad-

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[29] In any event, there is nothing irrational about the distinction created. Congress could well have taken notice that the number of domestic automobile manufacturers is limited. Congress could also have reasoned that given the importance of this industry, and the special attention it receives in the Clean Air Act generally, it was reasonable to expect EPA to develop the technical expertise necessary to carry out inspections with its own employees. The same could hardly be said of the nearly infinite variety of expertise that might be needed in inspection of all other forms of industrial plants. See page 45, *infra*.

[30] The Superfund bill, which created a cleanup and compensation mechanism to address hazardous waste deposits, eventually was enacted into law, with changes that are not pertinent here, on December 11, 1980. Comprehensive Environmental Response Compensation and Liability Act of 1980, Pub. L. No. 96-510, 94 Stat. 2767, 42 U.S.C. (Supp. V) 9601 *et seq.*

> ministrator will frequently utilize contractors as his authorized representatives. *The access, entry and other information-gathering powers granted to the Administrator and his authorized representative under * * * section 114 of the Clean Air Act [and] section 308 of the Clean Water Act * * * apply to authorized Federal contractors as the Administrator's representatives.*

S. Rep. No. 96-848, 96th Cong., 2d Sess. 62 (1980) (emphasis added). The conflict between these two pieces of legislative history emphasizes the hazards of reliance upon after-the-fact legislative history. In both instances the reliability of the statements made respecting earlier legislation is open to question, both because there was relatively little incentive for any Member of Congress to state a different view, and because no Member is likely to have altered his vote because of agreement or disagreement with the Report's description of prior legislation.[31]

In addition to the legislative history of the Clean Water Act, the court of appeals relied (Pet. App. 29a) upon language and legislative history of Section 3007(a) of the Solid Waste Disposal Act, 42 U.S.C. 6927(a). As indicated above (page 10), a 1980 amendment added "representative[s]" of the Administrator to the enumeration of persons designated to make hazardous waste inspections. The Senate Report stated:

> [T]he amendment *clarifies* that the Administrator may authorize EPA contractors to obtain samples, perform inspections, and examine records at facilities which handle hazardous wastes.

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[31] In any event, the 1972 legislative history of the Clean Water Act is at best ambiguous. The language upon which the court of appeals relied (see page 10 note 7, *supra*), could be read to address only the status of contractors engaged in "research and development" as distinguished from those assisting in inspections to determine compliance with emissions limitations.

S. Rep. No. 96-172, 96th Cong., 2d Sess. 3 (1979) (emphasis added). Notwithstanding the fact that Congress chose the term "representative"—the very language at issue here—to achieve the effect noted in the report, the inference drawn by the court of appeals was: "[w]hen Congress meant to *expand* inspection authority *beyond* EPA officers and employees it knew how to do so and took specific steps to make that clear" (Pet. App. 30a; emphasis in original). But Congress has no obligation to create legislative history documenting that it meant what it said. See page 40, *supra*.

4. Our discussion thus far suffices, we presume to suggest, at least to demonstrate that the court of appeals' analysis is flawed, and that substantial arguments can be marshalled in favor of the agency's interpretation of the statute. Indeed, the court of appeals all but conceded the point (Pet. App. 16a-17a, 22a, 29a, 30a, 41a). The court acknowledged that "cogent arguments can be raised upon both sides" of the issue (*id.* at 33a), and recognized that inferences opposed to its own could "just as logically" be drawn from the legislative materials (*id.* at 30a; see also *id.* at 24a). In the circumstances, the court of appeals plainly was obliged to defer to the agency's interpretation of the statute it is charged with enforcing. See *Udall* v. *Tallman*, 380 U.S. 1, 16 (1965). To merit such deference the agency's interpretation of its statute need not be the only reasonable one, nor need it be the one the court would prefer were it writing on a clean slate. *Ibid.* And these principles apply with full force to our Nation's complex environmental laws. See, *e.g.*, *EPA* v. *National Crushed Stone Ass'n*, 449 U.S. 64, 93-84 (1980). Specifically, this Court has "accorded great deference to the Administrator's construction of the Clean Air Act." *Union Electric Co.* v. *EPA*, 427 U.S. 246, 256 (1976). In the circumstances, there is no room to doubt that the agency's interpretation of Section 114(a)(2) "was sufficiently reasonable to preclude the Court of Appeals from substituting its judgment for that of the Agency" (*Train* v. *NRDC*, 421 U.S. 60, 87 (1975)).[32]

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[32] Since its creation in 1970, the EPA has construed the phrase "authorized representative" as used in both Sections 114(a)(2) and 114(c) to include contractor-representatives. As the district court found, the

The court of appeals' decision eliminates an important tool employed by the EPA to assure enforcement of the Clean Air Act through its overview inspection program. If private contractors may not be designated to assist in conducting Section 114(a)(2) inspections, the agency's ability to operate an effective overview inspection program may be compromised. For instance, only 22 technically trained employees employed in EPA's Region IV (the administrative unit encompassing Tennessee) are responsible for monitoring compliance by approximately 4600 major stationary sources of air pollution located in an eight-state area. See Pet. App. 59a. EPA has relied upon contractor-representatives both because its own enforcement resources are limited and because private contractors often possess considerable expertise and experience with certain industrial processes of inspection interest (*id.* at 60a). If EPA may not use the services of contractor-representatives, it will be obliged to hire employees who possess the requisite technical expertise. Because such expertise may be industry-specific, the hiring of numerous experts, each possessing a narrow technical specialty may be required, even though the services of such experts are not necessarily required on a full-time basis. Accordingly, the decision of the court of

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clearest indication of EPA's construction of the term "authorized representative" is found in the agency's conduct. In addition, since its creation in late 1970, EPA has sought and received appropriations for the use of contractors to provide technical support for its enforcement responsibilities: See *Second Supplemental Appropriations for Fiscal Year 1971: Hearings on H.R. 8191 Before the Senate Comm. on Appropriations*, 91st Cong., 1st Sess. 1626 (1971). See also *Agriculture—Environmental and Consumer Protection Appropriations for 1973: Hearings Before a House Subcomm. on Appropriations of the Comm. on Appropriations*, 92d Cong., 2d Sess., Pt. 5, at 471-506 (1972). EPA's interpretation of the term "authorized representative" employed in Section 114 of the Clean Air Act is also reflected in the published administrative history of EPA's procedures for handling confidential business information. See 40 Fed. Reg. 21990 (1975); 43 Fed. Reg. 40007 (1978). We note, as well, that in considering amendments to the Clean Air Act, and to Section 114 in particular in 1977, Congress made no effort to alter EPA's use of contractors as authorized representatives.

appeals is likely to restrict EPA's ability to fulfill its statutory duties in the most efficient manner.

B. Sufficient Safeguards Exist to Protect Against Improper Disclosure of Trade Secrets

The Sixth Circuit's opinion reflects an unfounded apprehension that permitting the Administrator to secure technical support from contractor personnel during overview inspections could compromise trade secrets of a source subject to inspection (see Pet. App. 33a).[33] We note at the threshold that the court of appeals' concerns are its own and not Congress'. As explained above (page 38), Section 114(c) of the Clean Air Act generally prohibits public disclosure of trade secrets obtained in the course of a Section 114(a)(2) inspection, but permits disclosure to agency contractor-representatives providing technical assistance to the agency in carrying out the provisions of the Act. Plainly, concern about disclosure of proprietary information by contractor-representatives did not inform Congress' crafting of Section 114.

In any event, EPA fully shares the court of appeals' solicitude for the protection of confidential business information. The agency has established adequate safeguards against improper disclosure of trade secrets by contractor-representatives. Pursuant to regulations of general applicability, 41 C.F.R. 15-7.350-1 and -2, EPA's contract with PEDCo requires that trade secrets and similar information be kept confidential. A confidentiality agreement between PEDCo and its employees expressly forbids disclosure of confidential information. Under that agreement, employees are subject to dismissal as well as to liability for any damages incurred by PEDCo in consequence of any

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[33] The court of appeals' statement (Pet. App. 42a-43a), in denying EPA's petition for rehearing en banc, that EPA had not demonstrated that it "requires the services of a private contractor who is a competitor of Stauffer with conflicting interests who may have an axe to grind and may be interested in obtaining trade secrets of Stauffer" is totally without record support. The district court remarked correctly that "[i]t does not appear in this case * * * that PEDCo Environmental, Inc. was in direct competition with Stauffer" (Pet. App. 54a).

willful breach of confidentiality.[34] Under EPA regulations, the private contractor agrees that an "affected business having an interest in information concerning it"—*i.e.*, a source subject to inspection—is entitled to third-party beneficiary status under any such confidentiality agreement and may enforce the agreement against any breaching employee. 40 C.F.R. 2.301(h)(2)(ii)(C). In addition, a powerful incentive for scrupulous observance of confidentiality requirements is provided by agency regulations that provide that breach of confidentiality is grounds for debarment of the contractor or the employee responsible. 40 C.F.R. 2.211(d). As the district court found, the combined effect of these safeguards is "sufficient protection against disclosure" (Pet. App. 53a).

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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[34] The pertinent portions of the confidentiality agreement between PEDCo employees and PEDCo are reproduced at Pet. App. 53a n.5.

APPENDIX

Section 114 of the Clean Air Act, 42 U.S. C. (Supp. V) 7414, provides in pertinent part:

Recordkeeping, inspections, monitoring, and entry

(a) Authority of Administrator or authorized representative

For the purpose (i) of developing or assisting in the development of any implementation plan under section 7410 or section 7411(d) of this title any standard of performance under section 7411 of this title, or any emission standard under section 7412 of this title, (ii) of determining whether any person is in violation of any such standard or any requirement of such a plan, or (iii) carrying out any provision of this chapter (except a provision of subchapter II of this chapter with respect to a manufacturer of new motor vehicles or new motor vehicle engines)—

(1) the Administrator may require any person who owns or operates any emission source or who is subject to any requirement of this chapter (other than a manufacturer subject to the provisions of section 7525(c) or 7542 of this title) with respect to a provision of subchapter II of this chapter to (A) establish and maintain such records, (B) make such reports, (C) install, use, and maintain such monitoring equipment or methods, (D) sample such emissions (in accordance with such methods, at such locations, at such intervals, and in such manner as the Administrator shall prescribe), and (E) provide such other information as he may reasonably require; and

(2) the Administrator or his authorized representative, upon presentation of his credentials—

(A) shall have a right of entry to, upon, or through any premises of such person or in which any records required to be maintained under paragraph (1) of this section are located, and

(B) may at reasonable times have access to and copy any records, inspect any monitoring equipment or method required under paragraph (1), and sample any emissions which such person is required to sample under paragraph (1).

* * * * *

(c) Availability of records, reports, and information to public; disclosure of trade secrets

Any records, reports or information obtained under subsection (a) of this section shall be available to the public, except that upon a showing satisfactory to the Administrator by any person that records, reports, or information, or particular part thereof (other than emission data), to which the Administrator has access under this section if made public, would divulge methods or processes entitled to protection as trade secrets of such person, the Administrator shall consider such record, report, or information or particular portion thereof confidential in accordance with the purposes of section 1905 of title 18, except that such record, report, or information may be disclosed to other officers, employees, or authorized representatives of the United States concerned with carrying out this chapter or when relevant in any proceeding under this chapter.

(d) Notice of proposed entry, inspection, or monitoring

(1) In the case of any emission standard or limitation or other requirement which is adopted by a State, as part of an applicable implementation plan or as part of an order under section 7413(d) of this title, before carrying out an entry, inspection, or monitoring under paragraph (2) of subsection (a) of this section with respect to such standard, limitation, or other requirement, the Administrator (or his representatives) shall provide the State air pollution control agency with reasonable prior notice of such action, indicating the purpose of such action. No State agency which receives notice under this paragraph of an action proposed to be taken may use the information contained in the notice to inform the person whose property is proposed to be affected of the proposed action. If the Administrator has reasonable basis for believing that a State agency is so using or will so use such information, notice to the agency under the paragraph is not required until such time as the Administrator determines the agency will no longer so use information contained

in a notice under this paragraph. Nothing in this section shall be construed to require notification to any State agency of any action taken by the Administrator with respect to any standard, limitation, or other requirement which is not part of an applicable implementation plan or which was promulgated by the Administrator under section 7410(c) of this title.

(2) Nothing in paragraph (1) shall be construed to provide that any failure of the Administrator to comply with the requirements of such paragraph shall be a defense in any enforcement action brought by the Administrator or shall make inadmissible as evidence in any such action any information or material obtained notwithstanding such failure to comply with such requirements.